No. 78-1748

In the Supreme Court of the United States

OCTOBER TERM, 1978

STAN LEAVITT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A-1 to A-25) are not reported.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on April 23, 1979. The petition for a writ of certiorari was filed on May 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the admission of a plea of nolo contendere to impeach a defense witness constituted prejudicial error.

2. Whether the conduct of the trial judge denied petitioners a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioners were convicted on six counts of stealing saw logs that were the property of the United States, in violation of 18 U.S.C. 641. Petitioners Stan and Glen Leavitt were placed on three years' probation, and petitioner Lee Johnson was placed on two years' probation. The court of appeals affirmed (Pet. App. A-13 to A-26).

In June 1976, the Leavitt Lumber Company commenced logging operations in the Uinta National Forest in Utah pursuant to a sales contract with the United States Forest Service. This contract authorized the Leavitt Lumber Company, which is operated by petitioners Stan and Glen Leavitt,[1] to cut and remove 1740 identified trees, which had been estimated to contain approximately one million board feet of timber. As fixed by the contract, the price to be paid was to be based on the actual amount of timber harvested. That figure, in turn, was to be determined by measuring ("scaling") representative truckloads of the timber. Thus, the drivers were to number consecutively each truckload of timber removed from the assigned tract. Upon reaching the Leavitt timber mill the driver would obtain a correspondingly numbered, sealed envelope that had been prepared by the Forest Service. By examining the contents of the envelope, the driver could determine whether the Forest Service had randomly preselected his particular load for scaling by the Forest Service. Approximately 20% of the loads were so selected, and the total contract price equaled five times the amount due for the scaled loads (Pet. App. A-3 to A-5, A-15 to A-18; Tr. 11, 17-29).

[1]Petitioner Lee Johnson is a driver for the Leavitt Lumber Company.

Because the initial scale loads appeared to be unduly small, the Forest Service began an investigation of the Leavitt operation. At trial, various agents testified to the fraudulent activities that they had observed and photographed. For example, the agents saw that petitioners had marked multiple truck loads with the same number and also had significantly underloaded designated scale loads. In addition, petitioner Johnson admitted to an undercover agent that he had stolen several loads of logs at the Leavitts' behest, either by prematurely checking the envelopes to see if the next load was to be scaled (and therefore to be underloaded) or by hauling multiple loads marked by the same number. The undercover agent also watched petitioners Johnson and Glen Leavitt remove a small inferior log from a truck so that it could be saved for a scale load (Pet. App. A-18 to A-19; Tr. 122-132, 134-138, 175-178, 184-194, 228-230; Gov't Exhs. 7, 9-14, 20-22).

At the culmination of the investigation, the federal agents obtained a search warrant covering a truckload of timber. During the course of the search, Glen Leavitt explained his fraudulent activities to an agent, stating that " 'when you bid nearly a hundred dollars a thousand board foot, this is the only way you can stay in business' " (Tr. 138). Similarly, petitioner Johnson, after being advised of his *Miranda* rights, also admitted his complicity in the theft of the logs and signed a written confession. A subsequent measurement of the remaining uncut timber showed that petitioners had stolen 271,000 board feet of timber worth approximately $29,000 (Pet. App. A-5, A-18 to A-19; Tr. 134-138, 513-514, 542).

ARGUMENT

1. Petitioners contend (Pet. 5-8) that the prosecution's cross-examination of Dale Leavitt (father of petitioners Glen and Stan Leavitt) deprived them of a fair trial. Dale

Leavitt testified for the defense in an attempt to show that the missing logs were attributable to the government's miscalculation rather than petitioners' misdeeds. In particular, he stated that the Forest Service had overestimated the available timber in all of the 65 sales in which he had been involved (Tr. 305-308, 322-324). In order to show that the log shortages could be caused by theft, the prosecution, over objection, cross-examined Dale Leavitt about the plea of nolo contendere previously entered by his son (Lynn Leavitt) to the charge of stealing logs (*id.* at 323-331). Thereafter Lynn Leavitt took the stand to explain the circumstances of his plea (Tr. 370-372).

Assuming that the prosecution's cross-examination was improper, the court of appeals correctly concluded that the error was harmless. The evidence against petitioners, which included substantial eyewitness and photographic testimony and petitioners' inculpatory statements, was overwhelming. Moreover, there was no cognizable prejudice to petitioners from the disclosure that the brother of two of the petitioners had previously entered a plea of nolo contendere in a separate, unrelated incident in Wyoming. Indeed, Lynn Leavitt testified on behalf of petitioners, thus ensuring that the jury did not confuse his crime with that charged against his brothers. And the court of appeals specifically found that "Lynn Leavitt's plea had little tendency to undermine the credibility of Dale Leavitt's testimony" (Pet. App. A-24). Further review of this fact-bound question is not warranted.[2]

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[2]There is no basis for petitioners' suggestion that the court of appeals precluded them from raising this claim. The opinion of the court of appeals on rehearing expressly discusses petitioners' claim, but concludes that the error was harmless (Pet. App. A-23 to A-24).

2. Petitioners also contend (Pet. 8-9) that the trial judge's conduct deprived them of a fair trial. But the court of appeals, after carefully reviewing the entire record, properly rejected this claim (Pet. App. A-25):

> The record does not disclose any particular actions on the part of [the trial judge] which of themselves carry a substantial impact. There are some quotations in the defendants' brief, but they are not individually, or as a whole, sufficient to support the argumentative conclusions that the defendants offered. * * * [The trial judge's] conduct was not a model of judiciousness. We do not conclude, however, that it resulted in an atmosphere that created prejudice calling for reversal.

The court further noted that defense counsel's refusal on several occasions to accept the district court's rulings was in part responsible for the incidents complained of. In short, given the overwhelming evidence and the context and nature of the trial judge's alleged misconduct, the error was harmless beyond a reasonable doubt. See, *e.g.*, *United States* v. *Busic*, 592 F. 2d 13, 34-37 (2d Cir. 1978) (Feinberg, J., concurring); *United States* v. *Cardall*, 550 F. 2d 604, 606 (10th Cir. 1976), cert. denied, 434 U.S. 841 (1977).[3]

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[3]Contrary to petitioners' claim (Pet. 8), the courts of appeals have not "applied inconsistent rules and achieved inconsistent results" in reviewing contentions similar to that raised here. Rather, the courts of appeals, in accordance with *Glasser* v. *United States*, 315 U.S. 60, 82-83 (1942), have uniformly analyzed claims of trial judge misconduct by reviewing the record as a whole to make sure that "substantial rights of the [defendants] were not affected." See also, *e.g.*, *United States* v. *Cardall*, *supra*; *United States* v. *Sclafani*, 487 F. 2d 245, 256 (2d Cir.), cert. denied, 414 U.S. 1023 (1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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